

(2)
No. 90-195

Supreme Court, U.S.

FILED

AUG 30 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

CITICORP MORTGAGE COMPANY, INC.,

Petitioner,

v.

CITICORP,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The questions presented by petitioner are not relevant to the Petition. Respondent files this opposition pursuant to Supreme Court Rule 15.1 to point out misstatements of fact set forth in the Petition which have a bearing on the issues properly before the Court if the Petition would be granted. The following question is the only one properly before the Court:

1. Whether the Petition should be denied under the principles of *res judicata* because the issues and parties are identical to those in an earlier decision from the United States Court of Appeals for the Eleventh Circuit decided against petitioner.

RULE 29.1 LISTING

Citicorp is a parent corporation, all subsidiaries of which are wholly owned.

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**TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES**

Respondent Citicorp files this its Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner Citicorp Mortgage Company, Inc.

BACKGROUND FACTS

Before discussing the question properly presented, an understanding of the history of the proceedings below is necessary. The appellate decision for which a Writ of Certiorari is sought is directed to a narrow issue involving only the corporate defendant, Citicorp Mortgage Company, Inc., not the individual defendant, Mr. Luis A. Soro.

The relevant starting point is the per curium decision by the United States Court of Appeals for the Eleventh Circuit dated June 30, 1988, which dealt with an appeal of the District Court's grant of summary judgment for respondent Citicorp. (Appendix I) The Court of Appeals dismissed Citicorp Mortgage Company Inc.'s appeal for lack of jurisdiction because the appeal was filed by the corporation's president, Mr. Soro, who is not a lawyer. (Appendix I, App. 2-3; Appendix II) The appeal as to Mr. Soro personally was reversed and remanded on the technical ground that the notice requirement of Fed. R. Civ. P. 56(c) was not followed. (Appendix I, App. 3; Appendix II)

On remand, the District Court again entered summary final judgment against Mr. Soro personally (Appendix III, App. 17), after noting that the appeal on behalf of

Citicorp Mortgage Company, Inc. was dismissed for lack of jurisdiction. (Appendix III, App. 6-7)

Mr. Soro then filed a motion for reconsideration of the summary final judgment and, on behalf of Citicorp Mortgage Company, Inc., filed a motion for leave to retain counsel for the corporation. The District Court on November 2, 1988 denied Mr. Soro's motion for reconsideration and granted the corporation's motion for leave to retain counsel. (Appendix IV)

Mr. Soro then filed a first notice of appeal on November 4, 1988 from the summary final judgment (Appendix V), which is the subject of a separate appeal that is presently pending before the United States Court of Appeals for the Eleventh Circuit, No. 88-6621.

The appeal for which petitioner is requesting this Writ of Certiorari, on the other hand, stems from a second notice of appeal. (Appendix VI) This one was filed by Mr. Soro on behalf of Citicorp Mortgage Company, Inc. on November 11, 1988, concerning the ruling by the District Court in its November 2, 1988 order directed to Citicorp Mortgage Company, Inc. The District Court's November 2, 1988 order granted Citicorp Mortgage Company, Inc.'s motion to retain counsel while noting that the doctrine of *res judicata* precluded any further reconsideration of the District Court's summary final judgment against Citicorp Mortgage Company, Inc. (Appendix IV, App. 20, fn. 1) This point of information footnote is what was appealed by Mr. Soro on behalf of Citicorp Mortgage Company, Inc., affirmed per curium in Case No. 88-6178 by the

Court of Appeals (Appendix VII), and is the basis for the only issue properly before this Court.

In summary, the only legal issue properly before this Court is whether Citicorp Mortgage Company, Inc. is precluded under the principles of *res judicata* from any further review of the District Court's summary final judgment because of the Court of Appeals' decision of June 30, 1988. (Appendix I; Appendix II)

ARGUMENT

The Petition should be denied because it involves the sole question of whether Citicorp Mortgage Company, Inc. could now challenge the summary final judgment against it, which had previously been affirmed by the Court of Appeals on June 30, 1988. No timely attempt was made to obtain a Writ of Certiorari from that June 30, 1988 decision. Since the identical issues and parties would be involved if counsel were now retained, the doctrine of *res judicata* precludes any further consideration of that judgment. This is the only issue which was addressed in the Court of Appeals' decision which is relevant to the subject Petition.

Aside from the fact that the Court of Appeals was correct in affirming the District Court vis-a-vis Citicorp Mortgage Company, Inc. this Petition should be denied because no showing has been made of any special and important reasons why the Petition should be granted, as required by Supreme Court Rule 10.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX I
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5884
Non-Argument Calendar

CITICORP,

Plaintiff-Counter Defendant
Appellee,

versus

CITICORP MORTGAGE COMPANY, INC.,

Defendant-Counter Plaintiff
Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 1988)

Before HILL, FAY and VANCE, Circuit Judges.

PER CURIAM:

In this action for trademark infringement defendants Citicorp Mortgage Company, Inc. (Citicorp Mortgage) and Luis A. Soro appeal from the district court's grant of summary judgment for plaintiff Citicorp. We dismiss Citicorp Mortgage's appeal for lack of jurisdiction. As to Soro, we reverse.

In August 1985 Citicorp brought this action under the Lanham Act, 15 U.S.C. §§ 1051-1127, and Florida statutory and common law. Citicorp Mortgage and Soro counterclaimed, seeking damages for tortious interference

with contractual relationships. In March 1987 Citicorp filed a motion for summary judgment. At the same time the parties filed a joint motion to have the court modify its existing scheduling order so that it could first address Citicorp's motion for summary judgment. In the motion the parties agreed that the defendants would have at least thirty days to respond to the motion for summary judgment. They also agreed that the defendants could have additional time if reasonably needed to conduct further discovery.

By June the defendants had not filed a response to Citicorp's motion for summary judgment. On June 19 the magistrate denied the defendants' motion to enlarge the time to respond and recommended that the motion for summary judgment be granted by default. The district court accepted the magistrate's recommendation and on September 9 entered summary judgment in favor of Citicorp both on its claims and on the defendants' counterclaims. Following the court's entry of judgment Soro brought this appeal *pro se* on behalf of himself and Citicorp Mortgage.¹

At the outset we must address a jurisdictional problem. Soro, who is not a lawyer, filed Citicorp Mortgage's notice of appeal and is attempting to represent the corporation *pro se*. It is well settled in this circuit that a corporation must be represented by counsel. *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985), *cert. denied*, 474

¹ In April 1987 the attorney for Citicorp Mortgage and Soro had filed a motion to withdraw as counsel which the court denied. Neither Citicorp Mortgage nor Soro is represented by counsel on appeal.

U.S. 1058 (1986); *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 609 (1984), cert. denied, 471 U.S. 1056 (1985); *In re K.M.A., Inc.*, 652 F.2d 398, 399 (5th Cir. Unit B 1981). This is true even when the person seeking to represent the corporation is an officer or major shareholder. *Palazzo*, 764 F.2d at 1385. Because Citicorp Mortgage is not represented by counsel, it cannot proceed with its appeal. Accordingly, its appeal is dismissed.

Soro is of course entitled to bring an appeal on his own behalf. See 28 U.S.C. § 1654. Because the court failed to comply with the notice requirement of Rule 56(c) of the Federal Rules of Civil Procedure, we reverse its judgment as to Soro.

Rule 56(c) states that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." We have interpreted this language to require "10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion will be taken under advisement by the trial court as of a certain day." *Moore v. Florida*, 703 F.2d 516, 519 (11th Cir. 1983); see also *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). This is a "bright-line" rule that applies to all litigants, and this court will *sua sponte* reverse when a district court fails to give the required notice. Here, the court failed to give the defendants advance notice of the date on which it was going to consider Citicorp's motion for summary judgment. Accordingly, the court's judgment as to Soro is reversed and remanded for proceedings consistent with this opinion. DISMISSED in part; REVERSED and REMANDED in part.

APPENDIX II
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5884
Non-Argument Calendar

D.C. Docket No. 85-2960

CITICORP,

Plaintiff-Counter Defendant
Appellee,

versus

CITICORP MORTGAGE COMPANY, INC.,

Defendant-Counter Plaintiff
Appellant.

Appeal from the United States District Court for the
Southern District of Florida

Before HILL, FAY and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, DISMISSED in part; REVERSED in part; and that this cause be and the same is hereby REMANDED to said

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District Court for further proceedings in accordance with the opinion of this Court.

It is further ordered that defendant-Counter Plaintiff Appellant pay to plaintiff-counter defendant appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 30, 1988

For the Court: Miguel J. Cortez, Clerk

By: /s/ David Molaud
Deputy Clerk

ISSUED AS MANDATE: AUG 31 1988

APPENDIX III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 85-2960-CIV-SPELLMAN

CITICORP,
Plaintiff,

(Filed Oct 9,
1988)

-vs-

LUIS SORO, an individual,
Defendant.

SUMMARY FINAL JUDGMENT

THIS CAUSE comes before the Court upon Plaintiff CITICORP's ("CITICORP") Motion for Summary Judgment. This action was first brought against CITICORP MORTGAGE COMPANY, INC. (CITICORP MORTGAGE). CITICORP MORTGAGE answered and subsequently filed two counterclaims on October 6, 1986. On March 5, 1987, Plaintiff filed its Amended Complaint adding Defendant, LUIS SORO ("SORO"), as a party defendant. Both defendants filed answers and affirmative defenses to that Amended Complaint. Although SORO was represented by counsel at that time, SORO continually [sic] attempted to file Motions in his own behalf and on behalf of CITICORP MORTGAGE.

This Court entered Summary Final Judgment against both CITICORP MORTGAGE COMPANY, INC. and SORO and in favor of Plaintiff on September 8, 1988 [sic]. SORO filed a *pro se* appeal on behalf of himself and CITICORP MORTGAGE. The United States Court of Appeal for the Eleventh Circuit dismissed CITICORP MORTGAGE's appeal for lack of jurisdiction and

reversed and remanded this Court's judgment as to SORO. The ground of that reversal was that sufficient notice was not given before summary judgment was entered.

This Court, in a status conference held on August 24, 1988, notified SORO and counsel for plaintiff that it would reconsider the plaintiff's Motion for Summary Judgment as to SORO personally "based upon the record as it existed at the time of the appeal, plus any new materials that the parties submit to this Court within 10 days of this Notice." The Court also issued notice in writing to SORO on that same date and specifically invited SORO to "file any sworn affidavits or other matters bearing on the issues presented in the Plaintiff's Motion for Summary Judgment, that might serve to convince this Court that there are still material issues of fact remaining in this case requiring that this issue be tried." The Court cautioned SORO that all material had to be received within ten (10) days of the date of the notice.

SORO filed a "Brief in Opposition" to the Summary Judgment on August 31, 1988, along with his affidavit. SORO also filed a Counterclaim on August 31, 1988. Plaintiff filed its reply on September 10, 1988, and a Motion to Strike SORO's counterclaim on September 20, 1988. SORO responded to the Motion to Strike on Sept. 23.

FINDINGS OF FACT

1. This is an action for service mark infringement and unfair competition [sic] arising under the Trademark Act of 1946, as amended (the Lanham Act, 15 U.S.C.

§ 1051 *et seq.*) and under the common law and statutory [sic] law of Florida. This Court has jurisdiction pursuant to 15 U.S.C. § 1121 (actions arising under the Federal Trademark Act) and 28 U.S.C. § 1338(a) (acts of Congress relating to trademarks) and § 1338(b) (pendent jurisdiction over claims of unfair competition and injury to business reputation).

2. This Court also has diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff is incorporated under the laws of the State of Delaware and is duly authorized to do business in the State of New York. Defendant is a private individual residing in Florida.

3. This Court has venue pursuant to 28 U.S.C. § 1391. All defendants reside in Miami, Florida, and the alleged acts of trademark infringement occurred [sic] in Miami, Florida.

4. SORO has used the name CITICORP MORTGAGE COMPANY, INC. since 1931 and is so registered with the Florida Secretary of State. At the time SORO formed his corporation and registered the name CITICORP MORTGAGE with the State of Florida, Plaintiff did not have a Florida office, although it was a nationally known business. Plaintiff did not directly enter the Florida market until 1984.

5. Plaintiff has used the name CITICORP since 1971 and officially changed its name to Citicorp in 1976. Plaintiff obtained its initial registration for CITICORP in 1974, and CITICORP and Design in 1977, both marks being incontestable. Plaintiff also owns several composite marks that include CITICORP.

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8. The mark "CITICORP" is not a generic word but is a combination of a fanciful word "citi" combined with the abbreviation for the word corporation, "corp". "CITICORP" is not found in any dictionary and the combination itself is a fanciful word.

9. The name CITICORP, as it appears in use by both Plaintiff and SORO, is identical, although the logos accompanying the name differ.

10. Both Plaintiff and SORO are presently engaged in the business of providing residential and commerical [sic] mortgages to customers in the Miami area. Both parties have an office in the Miami Beach and service that area.

11. Both plaintiff and SORO advertise in the Miami area through the use of flyers, signage, newspaper inserts, business cars [sic], stationery and Yellow Pages listings.

12. Actual confusion either exists or is likely to exist regarding the use of the name CITICORP by SORO. The name used by the Plaintiff and the name used by SORO are substantially identical. SORO has received both telephone calls and mail directed to Plaintiff.

CONCLUSIONS OF LAW

Plaintiff moved for summary judgment on all four counts of its Complaint based on infringement of its "CITICORP" mark. Plaintiff alleged that SORO's use of the name "CITICORP" for his residential and commerical [sic] mortgage business constituted: 1) infringement of

Plaintiff's incontestable federal registrations for "CIT-
" 2) false designation of origin under 15 U.S.C.
§ 1125(a); 3) common law unfair competition; and 4)
injury to Plaintiff's business reputation under § 495.151,
Florida Statutes.

Summary judgment is appropriate in trademark
cases, although "each case must be decided upon its
particular facts. . . ." *Beef/Eaters Restaurants, Inc. v. James
Burrough Ltd.*, 398 F.2d 637, 638 (5th Cir. 1985).¹ Summary
judgments are recognized as "a very useful device to
avoid a plenary [sic] trial." *Id.* at 640.

The Court of Appeals for the Eleventh Circuit con-
siders seven elements in determining trademark or ser-
vice mark infringement; 1) the type of trademark; 2) the
similarity of the design; 3) the similarity of product; 4)
the identity of retail outlets and purchasers; 5) the iden-
tity of advertising media used; 6) the defendant's intent;
and 7) actual confusion. *John H. Harland Co. v. Clarke
Checks, Inc.*, 711 F.2d 966, 972 (11th Cir. 1983).

1) Type of Trademark

A key element in determining the protection to be
afforded to any mark is "[t]he strength and distinctive-
ness" of that mark. *John H. Harlan Co. v. Clarke Checks,
Inc.*, 711 F.2d at _____. "Strong marks are widely protected,

¹ In *Banner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.
1981) (*en banc*), the 11th Circuit adopted as binding precedent
all decisions of the former 5th Circuit handed down prior to
the close of business on September 30, 1981.

as contrasted to weak marks." *Id.* at _____. The mark "CITICORP" is a combination of a fanciful word "citi" combined with the abbreviation for the word corporation, "corp". "CITICORP" is not found in any dictionary, and therefore must be considered a fanciful word.

The Eleventh Circuit found that a similar word "CITIBANK," which is owned by Plaintiff's subsidiary, was not generic. *Citibank, N.A. v. Citibanc Group, Inc.*, 724 F.2d 1540 (11th Cir. 1984). This Court reaches the same conclusion in regards to CITICORP, a very similar name.

Plaintiff has used the name CITICORP since 1971 and officially changed its name to Citicorp in 1976. Plaintiff obtained its initial registration for CITICORP in 1974, and CITICORP and Design in 1977, both marks being incontestable. Plaintiff also owns several composite marks that include CITICORP.

These above facts compel this Court to conclude that CITICORP is a strong mark that deserves equally strong protection. Because Plaintiff's registrations are incontestable, CITICORP cannot be challenged as merely descriptive, but only if probative evidence shows that it is generic. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985). There has been no such probative evidence offered that supports SORO's contention that CITICORP is a generic term. The fact that the words "city" and "corp" are often used, albeit independently of each other, does not tend to prove that this precise combination of the two words, with city spelled "citi," is a generic term.

2) Similarity of the Design

Defendant's use of the name CITICORP is identical to Plaintiff's registered mark. The print is exactly the same and the name, as printed, appears identical.

SORO argues that the logo used in conjunction with CITICORP differs and therefore the marks are not similar. The issue in this case, however, is the use of the name CITICORP and here, the name is identical. The fact that the logos differ matters little because it is the name that is distinctive and not the accompanying logo.

3) Similarity of Product

Both the Plaintiff and SORO offer residential and commercial mortgages. Although the Plaintiff offers a much broader range of financial services, SORO's use of CITICORP is directly tied to services that both companies provide - residential and commercial mortgages.

4) Identity of Retail Outlets and Purchasers

Both Plaintiff and SORO offer residential and commercial [sic] mortgages in the Greater Miami area. Thus, it can be concluded that they have identical customers. Although [sic] Plaintiff has many branch offices, one of those branch offices is located in the Miami Beach area. SORO has only one office, also located in the Miami Beach area. Thus, again, there is a significant overlap of service area.

5) Identity of Advertising Media Used

Again, while Plaintiff's use of advertisement is much broader than SORO's, there is significant overlap in the

local area. Both advertise in the Miami area through the use of flyers, signage, newspaper inserts, business cards [sic], stationery and Yellow Pages listings. Therefore, the identity of advertising media is substantially identical in this local area.

6) Defendant's Intent

SORO has testified that he did not know of Plaintiff's use of the name "CITICORP" when he named his company. Instead, he claims that he picked the word "citi" based on nicknames of old girlfriends, and "corp" to signify red blood corpuscles [sic]. At the same time, SORO argues that the name "citicorp" is obviously generic and partly geographical and therefore cannot be protected as a tradename. While SORO's explanation of his name "citicorp" strains this Court's imagination (and most likely would strain that of any reasonable person), SORO's own explanation points up the fact that "CITICORP" is not a generic term and, in fact, is fanciful. SORO himself points out the fact that he did not use the name as either a generic or geographical term. CITICORP as it is used by both parties, therefore, is a fanciful name, and accordingly, a strong mark entitled to broad protection. SORO's assertion that he did not adopt the name CITICORP in an attempt to cause confusion is not credible; however, even if it were, this factor is more than outweighed by the other factors that are considered.

SORO argues that Plaintiff was not allowed into the South Florida market until four years after he began using the name CITICORP, in 1984. Plaintiff is, however, a nationally known and recognized business and its name

CITICORP is also nationally known and recognized. It is impossible to believe that a person in the same type of business would not have known of such a prominent company.

7) Actual Confusion

SORO admitted that he has received both telephone calls and mail directed to Plaintiff. SORO points out that it is not unusual for one business to receive mail for another. This may be true, but it is unlikely to occur in the absence of some sort of confusion. Thus, SORO's own testimony shows that confusion, or at least the likelihood thereof, does exist.

All of the factors considered above clearly favor Plaintiff. "[T]he record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial' " and summary judgment is appropriate. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 317, (1986). The above findings present no genuine issue as to any material fact and therefore require that the Court enter summary judgment for Plaintiff for the counts alleging infringement of Plaintiff's federal registrations, false designation of origin under 15 U.S.C. § 1125(a), and common law competition [sic]. Additionally, the evidence clearly shows that SORO's use of the name CITICORP dilutes Plaintiff's CITICORP mark. Summary judgment is therefore also proper for the count alleging violation of Florida's Anti-Dilution Statute.

SORO'S COUNTERCLAIM

SORO attempted to file a Counterclaim on August 31, 1988. SORO argues that this Counterclaim is allowed under the Rules because the Court in its Notice of Summary Judgment stated that it would consider the Motion for Summary Judgment "based upon the record as it existed at the time of the appeal, plus any new materials that the parties submit to this Court within 10 days of this Notice." SORO has obviously misunderstood this Court. The new materials referred to were only those going to the issue of Summary Judgment. SORO was previously represented by counsel. Counsel filed a [sic] almost identical counterclaim on behalf of the corporate defendant, CITIBANK MORTGAGE. No counterclaim was filed on behalf of SORO. At this point, such a counterclaim is completely untimely and will not be allowed. If SORO wished to have filed a counterclaim, the appropriate time would have been at the time the other counterclaim was filed. There has been no showing that the failure to add SORO's counterclaim within the time limits prescribed by Rule 15(a), Federal Rules of Civil Procedure (1988), was the result of "oversight, inadvertence, or excusable neglect," or that "justice requires" allowing this Counterclaim to be filed now.

Further, even if this Court were to allow the Counterclaim, SORO personally has no standing to bring this claim. All of the alleged injuries were to the corporate entity, CITICORP MORTGAGE, and not to SORO personally. See *National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution*, 748 F.2d 602, 608 (11th Cir. 1984); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1386-87 (11th Cir.

1985). These matters have been dealt with in the Summary Judgment issued against CITICORP MORTGAGE on September 8, 1987. This Court also points out that the granting of this Summary Judgment suggests that SORO's counterclaims would have been unsuccessful in any case.

USE OF NAME CITICORP

When this Court granted Summary Judgment against CITICORP MORTGAGE on September 8, 1987, CITICORP MORTGAGE was directed to cease all infringing activities, to change the corporate name and to deliver all infringing material for destruction. This Court informed SORO at the August 24, 1988, hearing that when the mandate from the 11th Circuit was received, this Court would issue an Order directing SORO, as the representative of CITICORP MORTGAGE, to initiate a change with regard to that name in accordance with this Court's summary final judgment. The Court went on to explicitly warn SORO that in the event that CITICORP MORTGAGE failed to abide by that Order, this Court would hold SORO responsible and would initiate contempt proceeding by way of civil contempt against the officer to whom that Order was and is directed, to wit, SORO. SORO was told at that time that he would have ten (10) days from the date of this Court's Order to conform to the Summary Judgment dated September 8, 1987, and change the name of the corporation on the records of the Secretary of State's Office for the State of Florida.

The mandate was received from the Eleventh Circuit on September 8, 1988. Therefore, SORO has ten days from

the date of this Order to comply with this Court's instructions contained in the September 8, 1988, Order and given to SORO in open court on August 24, 1988. Failure to do so will result in SORO being held in civil contempt.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's Motion for Summary Judgment is GRANTED. It is further ORDERED that the Counterclaim filed by SORO is DISMISSED as untimely, and for lack of standing. Defendant SORO, as sole stockholder and officer of CITICORP MORTGAGE COMPANY, INC. is hereby directed to initiate a name change for CITICORP MORTGAGE and to comply with the other directives contained in this Court's Summary Final Judgment dated September 8, 1987, within ten (10) days of the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida this 6 day of Oct, 1988.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT
JUDGE

cc: all counsel of record

APPENDIX IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-2960-CIV-SPELLMAN
(Filed Nov 3, 1988)

CITICORP,

Plaintiff,

-vs-

CITICORP MORTGAGE COMPANY,
INC., and LUIS SORO,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION
AND GRANTING MOTION FOR LEAVE
TO RETAIN COUNSEL

THIS CAUSE comes before the Court upon the Defendant's, SORO, Motion for Reconsideration, and Defendant's, CITICORP MORTGAGE COMPANY, INC., Motion for Leave to Retain Counsel for the Corporation.

The Court entered summary judgment against both of the original defendants, SORO and CITICORP MORTGAGE COMPANY, INC., on September 8, 1987. Both defendants were represented by counsel at that time, although counsel had filed a Motion to Withdraw. SORO filed a *pro se* appeal on behalf of himself and CITICORP MORTGAGE. The United States Court of Appeals for the Eleventh Circuit dismissed CITICORP MORTGAGE's appeal for lack of jurisdiction and reversed and remanded this Court's judgment as to SORO, individually. This Court reconsidered the Motion for Summary Judgment against SORO individually, and granted that Motion on October 6, 1988.

The first Motion this Court must address is the Motion for Reconsideration of the Summary Final Judgment entered against SORO, individually, on October 6, 1988. The Defendant SORO gives two reasons for this Motion for Reconsideration: 1) the summary judgment was untimely; and 2) the dismissal of SORO's personal counterclaims.

This Court fully considered both issues raised by the Defendant SORO in his Motion for Reconsideration. First, the Motion for Summary Judgment was timely. The Defendant SORO claims that the cutoff period for the filing of all Motions was March 11, 1987, pursuant to the pretrial scheduling order. SORO claims that the Motion for Summary Judgment was not filed with this Court until March 12, 1988. SORO claims to be a [sic] unrepresented party to this action since March 5, 1987, and further claims that he did not agreed [sic] to the joint motion to reschedule the pretrial conference.

The Motion for Summary Judgment was timely filed. The Defendant SORO fails to take into consideration the fact that there are three extra days allowed for mailing. The Motion for Summary Judgment was *served* by Federal Express on March 11, 1987. Thus, although not received by this Court until the next day, March 12, 1987, the Motion was within the time limit specified under the Pretrial Scheduling Order. Further, Defendants SORO and CITICORP MORTGAGE COMPANY, INC., were both represented by counsel, and that counsel filed an answer on both Defendant's behalf to the Plaintiff's Amended Complaint. Thus, although SORO continually filed Motions on his own behalf and on behalf of the corporation, he *was* represented. Counsel did file a Motion to Withdraw, but

that Motion was originally denied, and not granted until August 24, 1988, over a year later. Thus, even if the Motion for Summary Judgment had been untimely, the Defendant SORO would still be bound by the Joint Motion to Reschedule Pretrial Conference and Amend Scheduling Order.

The next issue raised by SORO is the dismissal of his counterclaims. This issue was fully addressed in this Court's Summary Final Judgment dated October 6, 1988. First, such a counterclaim is untimely. Second, even if the counterclaims were not untimely, the individual SORO has no standing to bring these counterclaims which allege injuries only to the corporate entity (of which SORO is an officer) and not to SORO personally. Third, these counterclaims have no merit in any case as evidenced by the granting of the summary judgments in favor of the Plaintiff, and against both CITICORP MORTGAGE COMPANY, INC., and SORO individually.

The second Motion filed by the Defendant is the Motion to Retain Counsel for the Corporation. The right to retain counsel for the corporation is always available and is therefore granted.¹

¹ This Court's Summary Final Judgment against the Defendant, CITICORP MORTGAGE COMPANY, INC., was upheld when the Eleventh Circuit Court of Appeals dismissed the corporation's appeal from this Final Judgment. Thus, the doctrine of *res judicata* precludes any further reconsideration of this Court's Summary Final Judgment against CITICORP MORTGAGE. There is, however, an Order to Show Cause pending against the corporation and the corporation is freely granted leave to retain counsel to address that issue.

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ORDERED AND ADJUDGED that the Motion for Reconsideration is DENIED. It is further ORDERED that the Motion for Leave to Retain Counsel is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida this 2 day of Nov, 1988.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT
JUDGE

cc: all counsel of record

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APPENDIX V

Citicorp

Plaintiff/Counter Defendant

-v-

Luis A. Soro and
CITICORP MORTGAGE COMPANY
INC.,

Defendant/Counter Plaintiff

&

Defendant/Counter Plaintiff

IN THE
UNITED STATES
DISTRICT
COURT FOR
THE SOUTHERN
DISTRICT OF
FLORIDA

CASE ACTION
85-2960
E.P. SPELLMAN

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendant/counter plaintiff above-named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the summary final judgment entered in this action on the 6th day of October, 1988 pursuant to the findings of fact and conclusion of law.

DATED: November 4, 1988

Respectfully submitted,

BY: /s/ Luis A. Soro

LUIS A. SORO

President

CITICORP MORTGAGE CO. INC.,

1515 Alton Road

Miami Beach, Florida 33139

(305) 538-4035

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing NOTICE OF APPEAL was served on the following by U.S. First

App. 23

Class Mail postage [sic] prepaid
on this 4th day of November 1988:
James B. Gamgrell [sic] Esq.
Pravel, Gambrell, Hewitt, Kimball,
& Krieger 1177 West Loop South
Suite 1010 Houston, Texas 77027

BY: /s/ Luis A. Soro
LUIS A. SORO

APPENDIX VI

Citicorp, et al.,

Plaintiff/Counter Defendant

v.

CITICORP MORTGAGE COMPANY
INC.,

&

Luis A. Soro

Defendant/Counter Plaintiff

&

Defendant/Counter Plaintiff

IN THE
UNITED STATES
DISTRICT
COURT FOR
THE SOUTHERN
DISTRICT OF
FLORIDA

CASE ACTION
85-2960

CIVIL E.P.
SPELLMAN

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendant/counter plaintiff above-named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order dated November 3, 1988 granting the motion for leave to retain counsel for the corporation but denying counsel to respond to the motion for summary judgment.

Respectfully submitted,

BY: /s/ Luis A. Soro
LUIS A. SORO

President

CITICORP MORTGAGE CO. INC.,
1515 Alton Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing NOTICE OF APPEAL was served on the following by U.S. First Class Mail, postage [sic] prepaid on this 11th day of November 1988: James B. Gambrell Esq.

App. 25

Pravel, Gambrell, Hewitt, Kimball, & Krieger 1177 West
Loop South, Suite 1010 Houston, Texas 77027.

BY: /s/ Luis A. Soro
LUIS A. SORO

APPENDIX VII
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-6178
Non-Argument Calendar

D.C. Docket No. 85-2690-CIV-EPS

CITICORP,

Plaintiff-Counterclaim
Defendant-Appellee,

versus

CITICORP MORTGAGE
COMPANY, INC.,

Defendant,

LUIS SORO,

Defendant-Counterclaim
Plaintiff-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 23, 1990)

Before KRAVITCH, HATCHETT, and ANDERSON, Cir-
cuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

